Connecticut Distributors, Inc. *and* Brewery and Soft Drink Workers, Liquor Drivers and New and Used Car Workers, Local 1040, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 2-CA-16156 and 2-CA-16664

May 1, 1981

DECISION AND ORDER

On December 11, 1981, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs.[1] Additionally, the Charging Party filed two motions to reopen the hearing and an affidavit in support thereof.[2]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Connecticut Distributors, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent's motion to strike the General Counsel's "anticipatory" response to Respondent's exceptions is hereby denied as lacking in merit.

[2] The Charging Party filed motions to reopen the record to introduce evidence concerning the alleged unconditional offer of some 10 additional unfair labor practice strikers to return to work and Respondent's asserted denial of reinstatement to them. Respondent opposes said motions. We find merit to Respondent's positions. The charge alleges generally that Respondent unlawfully denied reinstatement to unfair labor practice strikers. The complaint alleges that Respondent unlawfully denied reinstatement to nine enumerated individuals. The reinstatement rights of these nine employees were fully litigated, briefed by the parties, and passed upon by the Administrative Law Judge. The Charging Party was present at the hearing and the *Charging Party* at no time before the subject motions raised or attempted to litigate the reinstatement rights of these additional individuals. It has offered no explanation for its failure to do so. Accordingly, the Charging Party's motions are hereby denied.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was heard pursuant to due notice on January 28, 29, and 30, 1980, in Bridgeport, Connecticut.

The charge in Case 2-CA-16156 was filed on January 19, 1979. The charge in Case 2-CA-16664 was filed on August 20, 1979. The order consolidating cases and the consolidated complaint in this matter was issued on October 24, 1979 The main issues concern whether Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union and Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

Prior to the issuance on October 24, 1979, of the consolidated complaint in Cases 2-CA-16156 and 2-CA-16664, the General Counsel had issued, on July 31, 1979, a complaint in Case 2-CA-16156. Essentially, the complaints referred to above were similar except that the consolidated complaint added issues concerning the alleged refusal to reinstate unfair labor practice strikers. On or about August 10, 1979, Respondent had filed a motion to dismiss certain complaint allegations in Case 2-CA-16156 on the ground that such complaint allegations were not presented in the charge in said case and that therefore the same was barred by the requirements of Section 10(b) of the Act. Said contested allegations pertained to issues of supervisory involvement in a decertification petition. Respondent's motion further had alluded to the fact that a charge had been filed in Case 2-CA-15908 but had been subsequently withdrawn. In fact, a charge had been filed on October 2, 1978, and an amended charge had been filed on October 16, 1978, in Case 2-CA-15908, and a withdrawal request for such charges had been approved on November 22, 1978. Said charge and amended charge had specifically raised an issue as to an alleged refusal to bargain concerning supervisors circulating a decertification petition. It is noted that the charge in Case 2-CA-16156 was filed on January 19, 1979, specifically alleged acts of refusing to bargain and averred that Respondent's claim that the Union did not represent a majority of the employees was not in good faith. The General Counsel had timely filed an opposition to Respondent's motion to dismiss. Thereafter, on September 11, 1979, Associate Chief Administrative Law Judge Arthur Leff issued an order denying Respondent's motion to dismiss for the reasons argued by the General Counsel. Associate Chief Administrative Law Judge Leff cited in support of his order cases cited by the General Counsel[1] and referred to other cases in support thereof.[2]

On or about September 14, 1979, Respondent filed in Case 2-CA-16156 an amended motion to dismiss. Said amended motion appears in substance to be to the same effect as the original motion to dismiss. Apparently this motion was initiated prior to the receipt of Associate Chief Administrative Law Judge Leff's September 11, 1979, order. In any event, Respondent on or about September 17, 1979, withdrew its amended motion to dismiss but indicated its withdrawal was without prejudice to reraise the issue at a future point in time or to file exceptions to said order.

At the hearing, Respondent renewed and reiterated its motion to dismiss. I ruled that Associate Chief Adminis-

[1] *Stainless Steel Products, Incorporated*, 157 NLRB 232, 234 (1966), and *N.L.R.B. v. Fant Milling Company*, 360 U.S. 301, 307-308 (1959).

[2] *Cromwell Printery, Incorporated and/or Cromwell Business Forms Incorporated, et al.*, 172 NLRB 1817, 1821-22 (1968); *Pet Incorporated, Dairy Group*, 229 NLRB 1241 (1977).

trative Law Judge Leff's order was accepted as the law of the case. Respondent's answer to the consolidated complaint in Cases 2-CA-16156 and 2-CA-16664 averred a defense that the Board lacked jurisdiction because the circulation of an election petition was not raised in the charges in either Case 2-CA-16156 or 2-CA-16664, and was not related to the allegations in such charges. At the hearing Respondent argued in effect that this defense was different from its contention that Section 10(b) barred the litigation of the issue of supervisory involvement in the circulation of the decertification petition. It was indicated at the hearing that such arguments as might be made on such issues could be presented in briefs to be filed with the Administrative Law Judge. Respondent's brief contains reference to a continued contention that the complaint raises matters which were not raised in the charges, did not grow out of the charges, and are not related to the allegations in the charges.

Upon consideration of all of the facts, I reiterate the rulings made on these issues at the hearing by me and prior to the hearing by Associate Chief Administrative Law Judge Leff. The overall facts relating to the charges as filed and the complaint allegations reveal that the complaint allegations have support in the charges as filed and are properly a part of this proceeding.

If one ignores the fact that charges were filed in Case 2-CA-15908, specifically alleging that Respondent had engaged in refusing to bargain by having supervisors circulate decertification petitions, it is clear that the charge in Case 2-CA-16156 supports the allegations of unlawful supervisory activity in the circulation of a decertification petition in the complaint. Thus, the charge in Case 2-CA-16156 alleges general and specific allegations of conduct violative of Section 8(a)(1), (3), and (5) of the Act, and alludes to Respondent's claim of September 15, 1979, of belief of lack of majority status by the Union as being in bad faith. It is clear that the issue of supervisory involvement in the circulation of a decertification petition, on or about that time, is a part of the overall issue and therefore closely related thereto. Board and court law, as referred to by Associate Chief Administrative Law Judge Leff and set forth previously herein, require findings that the complaint allegations are founded upon sufficiently worded charges.

The fact that the charges in Case 2-CA-15908 were withdrawn with approval by the Regional Director, and that the language in such charges relating to supervisors circulating decertification petitions has not been specifically recited in subsequent charges does not limit the General Counsel's discretion to proceed on the charges in Cases 2-CA-16156 and 2-CA-16664. Had the Charging Party specifically reiterated the charges in Case 2-CA-15908, or requested reinstatement of such charges, the General Counsel, in his discretion, could have proceeded to issue a complaint as to such issues. Certainly, under the circumstances of Respondent's later refusal to bargain on November 30, 1979, the General Counsel's proceeding on such reiterated charges or reinstated charges would not have constituted an abuse of his discretion. Since the charges in Cases 2-CA-16156 and 2-CA-16664 are sufficiently related to the allegations of the complaint as issued, the General Counsel's exercise of his discretion to proceed on such charges and not to require a reiteration or reinstatement of previous charges is revealed to be proper.[3]

In sum, Respondent's motion to dismiss and its defense that certain allegations of the complaint are not based upon proper charges are rejected.

The hearing in this matter was completed on January 30, 1980. Unfortunately, a problem arose concerning the preparation of the transcript for the testimony taken on January 29, 1980, which was not resolved until April 1980. As a result, briefs by the parties were delayed and finally filed on June 4, 1980. The General Counsel utilized his brief to argue that, although not alleged, it had been litigated that (1) Respondent, by President Harrison, had made a speech on August 31, 1978, wherein Respondent had violated Section 8(a)(1) and (5) of the Act, and (2) Respondent, by Capasso, made promises of benefits to employees, circa September 11-15, 1979, in violation of Section 8(a)(1) and (5) of the Act. The General Counsel requested permission to amend the complaint to allege such conduct to be violative of the Act. Thereafter, Respondent filed an opposition to the General Counsel's "Post-Hearing Motion To Amend Complaint and Request to Reopen Hearing and File Reply Brief." On June 24, 1980, I issued an order according the parties an opportunity to file briefs with respect to such contentions. On the same date, the General Counsel filed a "Response to Opposition to General Counsel's Post-Hearing Motion To Amend Complaint." Such response was the equivalent of a brief on such issue. On July 21, 1980, Respondent filed its brief as to such issues.

The General Counsel argues that the issues referred to have been litigated. The General Counsel, however, does not set forth a desire to have the proceeding reopened. Respondent contends that these issues have not been litigated and seeks to have the proceeding reopened if the motion to amend is granted in whole or in part.

Upon consideration of the entire record and the contentions of the parties, I am persuaded that the issue of whether Respondent has violated Section 8(a)(1) and (5) of the Act by President Harrison's conduct on August 31, 1978, has not been fully litigated. The evidence relating to Harrison's conduct on August 31, 1978, reveals that a union steward was present when Harrison told employees of his last offer to the Union. Respondent contends that the issue has not been fully litigated, and that Harrison's conduct was with the understanding of or condonation by the Union. Under such circumstances, I am persuaded that the issue has not been fully litigated. If I were to grant the motion to amend the complaint, justice would require the reopening of the record to allow full litigation of such issue. The General Counsel's motion to amend seems to be premised entirely on an assumption that the issue has been fully litigated. The General Counsel does not appear to seek to have an amendment if further litigation is needed. In any event, considering the timing of the events and the issue sought to be injected in the context of the total litigation, I am persuaded that the case should not be delayed by such fur-

[3] *California Pacific Signs, Inc.*, 233 NLRB 450 (1977).

ther litigation. Accordingly, since the issue of whether Harrison's conduct on August 31, 1978, was violative of Section 8(a)(5) and (1) has not been fully litigated, the motion to amend the complaint in such regard shall be denied.[4]

Upon consideration of the entire record and the contentions of the parties, I am persuaded that the issue of whether Respondent has violated Section 8(a)(1) and (5) of the Act on the basis that Capasso, during September 11-15, 1978, made promises of benefits to employees to induce them to sign the petition to decertify the Union has been fully litigated.

The General Counsel's complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by Capasso's circulation of a union decertification petition. At the hearing testimony was elicited on direct and cross-examination relating to whether employees were promised increased benefits as compared to existing benefits. Respondent examined witnesses as to whether such benefits were the same as alluded to by Harrison in his speech to employees on August 31, 1978. Considering this and Respondent's arguments in its brief concerning the lack of "promises of benefits," I am persuaded and conclude and find that the issue of whether Capasso made promises of benefits when circulating the union decertification petition has been fully litigated. An amendment to the complaint in such regard is warranted. Respondent's argument that, if the motion to amend the complaint is granted, it should receive an opportunity to present additional evidence is rejected. Having litigated the issue as it did at the hearing, Respondent is not entitled to another bite at the apple at this time. In sum, it is found that the issue of Capasso's promises of benefits while circulating the decertification petition during September 11-15, 1978, has been fully litigated, a motion to amend the complaint in such regard is granted, and Respondent's motion to reopen the record is denied.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and Respondent and have been considered.

Upon the entire record in the case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The facts herein are based upon the pleadings and admissions therein.

At all times material herein, Connecticut Distributors, Inc., a Connecticut corporation with an office and place of business in Stratford, Connecticut, herein called Respondent's facility, has been engaged in the wholesale distribution of liquor products to customers within the State of Connecticut.

Annually, Respondent, in the course and conduct of its business operations described above, purchases and receives at its Startford, Connecticut, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut.

As conceded by Respondent and based upon the foregoing, it is concluded and found that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Brewery and Soft Drink Workers, Liquor Drivers and New and Used Car Workers, Local 1040, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Status of Capasso as a Supervisor*

The General Counsel alleges and Respondent denies that, "[a]t all times material herein, Anthony Capasso occupied the position of Respondent's dispatcher, and is now, and has been, at all times material herein, a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of Respondent, acting on its behalf."

Many of the facts relating to the issue of the status of Capasso are not disputed. There is some dispute as to the ultimate conclusionary facts, and there is a major dispute as to whether Capasso exercises independent judgment in the performance of his duties. The importance of this issue in the case has a bearing upon the effect of a decertification petition circulated by Capasso in September 1978.

For many years Respondent and the Union have had a collective-bargaining relationship concerning a unit of warehousemen and their helpers, drivers and their helpers, and the dispatcher and assistant dispatchers. Said relationship has involved the negotiation and existence of collective-bargaining agreements covering the above unit and specifically covering the dispatcher and assistant dispatchers. Capasso has been a dispatcher and a member of the Union at all times material to this proceeding. Capasso has participated fully as a member of the Union.

The bargaining unit at times relevant to this proceeding and as of mid-September 1978 consisted of 28 to 32 employees. Three of such employees were the dispatcher and assistant dispatchers.

The issue as litigated concerning Capasso's status essentially touches on whether he could hire employees, whether he could discipline employees, or whether he responsibly directed employees in their work. The litigation of the issue revealed in effect that, if Capasso is a supervisor, the assistant dispatchers are also supervisors.

The General Counsel presented specific evidence through witnesses Whittle, Hall, Laufer, Matthews, Siersazart, and Novak relating to such areas of indicia of supervisory responsibility. The General Counsel also elicited some testimony from Capasso and from Comptroller Block relating to Capasso's duties. Respondent elicited

[4] Although counsel for the General Counsel in brief alludes to Harrison's having made promises of benefits, the facts merely reveal that Harrison spoke in terms of his last offer to the Union.

testimony from Block and Capasso relating to Capasso's duties.

Considering all of such testimony and the logical consistency of the evidence, I find the following facts relevant to this issue:

1. Capasso and the assistant dispatchers had the authority to hire employees for temporary or casual jobs. Capasso and the assistant dispatchers exercised independent judgment in their determination of the hiring of such employees. Witnesses Whittle, Hall, Laufer, Matthews, Siersazart, and Novak all testified in composite effect that they were in effect interviewed by Capasso or one of the assistant dispatchers and were told of their hiring in such a way that it was obvious that they were hired by Capasso or one of the assistant dispatchers, and that at the time of their interviews or hiring Capasso or one of the assistant dispatchers did not have to check with anyone else. Respondent's witness Block testified to the effect that the hiring of a temporary or casual employe was of a routine nature, and that no exercise of independent judgment was exercised. Block testified to the effect that an applicant only had to have a social security number, be over 18 years of age, and have a driver's license to be hired. No evidence was presented to reveal that anyone other than the dispatcher or assistant dispatchers saw such applicants prior to their initial hiring. Considering the totality of the facts, I do not credit Block's conclusionary testimony referred to above. Since the collective-bargaining agreement revealed that an employee became a permanent employee with seniority status if employed 150 days in a 1-year period, since "casual lists" were maintained and used frequently, and since most permanent employees are hired from the casual lists, I am convinced that serious judgment is exercised in hiring casuals, at least with respect to drivers or drivers' helpers jobs. Thus, Capasso and the assistant dispatchers, in the exercise of authority to hire "casuals," perform the duties of a supervisor within the meaning of the Act.[5]

2. The facts are undisputed that Capasso and the assistant dispatchers have the authority to select employees from the "casual lists," from names given by employees or others, from the Union, or from other sources, and to call such employees to work or for employment when needed. In view of the fact that employment of casuals for 150 days within a 12-month period from initial employment qualifies such employees as permanent employees and gives such employees seniority status, and in view of the fact that such casual employees are a major source for the employment of employees as permanent employees, I conclude and find that Capasso and the assistant dispatchers exercise supervisory authority in such selection, calling to work, or hiring of employees.

3. Although the General Counsel adduced some evidence indicating that on a few occasions Capasso had spoken to employees in such a way that one might infer that a reprimand or warning was given, the overall facts reveal such evidence to be insufficient to establish that Capasso had or exercised the authority to give reprimands or warnings as a supervisory agent. Thus, the collective-bargaining agreement provided that "warnings" be in writing. And, Comptroller Block was the individual who handled all grievances. In sum, in total context, I do not find the evidence sufficient to establish that Capasso had or exercised the authority to give reprimands or warnings as a supervisory agent.

4. The overall facts clearly reveal that Capasso and the assistant dispatchers are the ones who normally direct and supervise the work of the warehousemen and their helpers and the drivers and their helpers. Block, an admitted supervisor, clearly has overall supervisory authority and responsibility for these employees and certain other employees. However, on a day-to-day basis Block does not come into contact with the above-referred-to employees. Unless Capasso and the assistant dispatchers are supervisors within the meaning of the Act, the employees referred to above are virtually without supervision. Respondent presented testimony to the effect that the overall operation is essentially routine and that no supervision of such employees is necessary. The facts are clear that from time to time changes in routes or designated drivers have to be made, and employees need time off for personal or other reasons. The facts reveal that on such occasions employees seek out Capasso and the assistant dispatchers, and that Capasso and the assistant dispatchers make such needed changes on their own. In sum, the facts reveal that Capasso and the assistant dispatchers responsibly direct the work of the employees in the bargaining unit and that in doing so Capasso and the assistant dispatchers exercise authority as supervisory agents within the meaning of the Act.

5. As to some of the evidence presented concerning Capasso's duties, it is sufficient to say that such evidence, in the total context of the facts, has no substantial probative value. Such evidence as referred to concerns the granting of time off for a funeral. The collective-bargaining agreement provides clearly defined rights with respect to funeral leave, and the exercise of authority in such regard constitutes merely the routine exercise of authority involving minimal judgment. The fact that an employee speaks to Capasso on such occasions, however, is consistent with Capasso's responsibilities of overall supervision. As to Capasso's possession of keys, use of a vehicle, and having privileges to take such vehicle home at night, such evidence merely indicates under the facts of this case that Respondent considers Capasso to be a reliable person. It does not indicate that Capasso exercises supervisory authority in carrying out his responsibilities.

6. Considering the totality of all of the evidence, the facts reveal that Capasso has hired an employee as a permanent employee when the employee had only just started as a casual employee. I am persuaded, however, that Block's testimony should be credited to the general effect that he and other management personnel, not the dispatcher or assistant dispatchers, generally determined who would be hired as permanent employees. The over-

[5] I note that Block's testimony concerning the hiring of drivers' helpers by drivers revealed that at times drivers' helpers were hired by management when drivers had furnished names of potential helpers, or that drivers' helpers were hired by the drivers upon instructions from management. This does not reveal that "applicants" could virtually hire themselves.

all facts, however, would reveal that Capasso's and the assistant dispatchers' authority to select and to call "casual" employees to work was equivalent to their having the power of effective recommendation as regards hiring.

Considering all of the foregoing, I am persuaded and conclude that Capasso possessed supervisory authority requiring the exercise of independent judgment relating to hiring and employing employees, and responsibly directed the work of employees. Respondent contends that the duties of Capasso were of a type that involved routine supervision and not the exercise of independent judgment. Board cases cited by Respondent are factually distinguishable. Thus, the facts in *Spector Freight System, Inc.*, 216 NLRB 551 (1975), involved dispatchers at Ripley, New York, who functioned essentially under instructions from a terminal at another location. Such duties of the Ripley dispatchers were essentially controlled by the contract and instructions via memorandum, etc. It is clear in the instant case that Capasso's exercise of hiring and selecting employees for call to work and his overall direction of employees goes beyond a mere routine exercise of authority.

In sum, the facts in this case reveal that Capasso is and was a supervisor of Respondent within the meaning of Section 2(11) of the Act.

B. *Responsibility of Respondent for Capasso's Conduct*

Although Respondent would normally be liable for the conduct of Capasso with respect to the question of unfair labor practices, both the General Counsel and Respondent on brief address the question of whether Respondent is accountable for Capasso's conduct, especially concerning the circulation of the decertification petition in early to mid-September 1978, since Capasso was a union member and included in the bargaining unit.

The Board for many years and in many cases has explicated a doctrine of reality as regards the question of responsibility by a respondent for acts of a supervisor who is a union member and who is included in the employer's bargaining unit. Thus, the Board has attempted to determine whether the acts of a supervisor in such instances were acts on behalf of the employer or acts on behalf of the "supervisor" as an employee and union member. The Board has always considered and determined that a supervisor within the meaning of the Act who is a union member and in the bargaining unit is an arm of management; for example, knowledge of employee union activity known to such supervisor is imputable to the employer even though respondent might not be held responsible for antiunion statements by said supervisor. One of the key words in most of the Board's decisions concerning employer responsibility for supervisors who are union members and in the bargaining unit is the word "generally." The Board in *Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647–648 (1956), set forth the following concerning the responsibility of an employer for a supervisor who is included in the unit:

> Statements made by a supervisor violate Section 8(a)(1) of the Act when they reasonably tend to restrain or coerce employees. When a supervisor is included in the unit by agreement of the Union and the Employer and is permitted to vote in the election, the employees obviously regard him as one of themselves. Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management. However, a supervisor, although mistakenly permitted to vote in the election by agreement of the parties, remains an arm of management. To the extent, therefore, that an employer's accountability for the conduct of a supervisor does not depend on employee reaction, the employer's responsibility for the supervisor's action is not affected by the fact of inclusion in the unit. Hence, an employer is chargeable with knowledge of union activities acquired by such a supervisor. And the supervisor's statements are admissible as evidence of his employer's motivation in discharging individuals. In neither of these situations is employee reaction a condition to employer responsibility.
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> Applying the above principles to the facts of this case, we find that, because of the lack of evidence that the Respondent actually or apparently authorized or ratified DuFour's course of conduct, the Respondent is not liable for such conduct. We shall therefore dismiss that portion of the complaint which alleged that the Respondent violated Section 8(a)(1) of the Act in this respect. However, we also find that the Respondent is chargeable with the knowledge of union activities acquired by DuFour during the course of his interrogation of various employees, including Felker and Witter, and that his threats and statements to these and other employees may be considered in determining the reason why the Respondent discharged Felker and Witter.

The foregoing must be construed to reveal that Capasso, despite the fact that he was in the bargaining unit, remained an arm of Respondent with the surrounding circumstances of Capasso's conduct being determinative as to whether Respondent would be liable for Capasso's conduct in circulating the petition against the Union as set forth later herein.[6]

As indicated, Capasso remained an arm of Respondent despite the fact that he was included in the bargaining unit. Thus, admissions expressly made or implied by Capasso may be construed in determining whether he was actually acting for Respondent or as an individual bargaining unit member.

[6] See *Typoservice Corporation*, 203 NLRB 1180 (1973), and *Thurston Motor Lines, Inc.*, 237 NLRB 498, 526 (1978).

Considering all of the facts as indicated hereinafter, I am persuaded that they reveal that Capasso was acting as an agent of Respondent when he circulated union decertification petitions between September 11 and 14, 1978, and that employees would reasonably construe that Capasso was acting as an agent for Respondent.

In such regard, it is noted that the collective-bargaining agreement in effect between Respondent and the Union in 1978 was due to expire at midnight of August 31, 1978. Respondent and the Union, although having engaged in bargaining at such time, had not reached agreement for a new contract. As of August 31, 1978, the Union had scheduled a meeting of the unit employees for midnight at the Union's office. The purpose of this meeting was to vote on Respondent's latest contract offer as well as to vote on whether or not to strike. Approximately an hour before the scheduled union meeting, Respondent's president, Donald Harrison, called together the unit employees and presented directly to them the Company's latest contract proposal. The union steward was present at the time that Harrison spoke to the employees. Harrison explained why this was the best offer the Company could make.[7]

Later the employees went to the union office where they voted to reject the Company's latest proposal and to go on strike. The next day, September 1, 1978, a strike commenced. Anthony Capasso and Henry Pavlowski, who were union members, attended and voted during the union meeting. Although Capasso did not picket, he did not cross the picket lines for the first 2 weeks of the strike.

On or around September 8,[8] Capasso had a discussion with Comptroller Stanley Block wherein Capasso told Block that many men were dissatisfied with the Union and asked Block to recommend a labor attorney. Block told Capasso he would get back to him. Block then called his labor attorney, Thomas R. Smith, and asked him for the names of some labor attorneys. Smith gave Block four names which Block then relayed to Capasso. Included on that list was a Victor Ferrante of Bridgeport whom Capasso chose to contact shortly thereafter. Capasso discussed the concept of decertification with Ferrante. Around September 10–12 Capasso called the employees on the phone and asked them to meet him at the travel agency where he worked part time. Capasso told the various groups of employees who came down to the travel agency that Donald Harrison would not negotiate further with the Union and that, if the men got rid of the Union and came back to work, they would receive certain specific wages and benefits, the same as those Harrison had previously considered to be his last proposal and the same as those Harrison had told the employees about on August 31, 1978. Most of the striking employees, pursuant to Capasso's suggestion, signed a handwritten decertification petition Capasso had in his possession. During this period of time Capasso also engaged in the same conversation with other employees while they were on the picket lines and some of these employees also signed the decertification petition. He gave two people to whom he spoke on the picket line copies of contracts reflecting terms and conditions of employment if they left the Union and crossed the picket lines.[9]

In the meantime, Respondent and the Union met in negotiations on September 2 and 11, 1978. Some of the employees who had signed the decertification petition for Capasso indicated that they desired that their names be deleted from such decertification petition. Because of this, Capasso decided that the decertification petition already signed should be discarded and that a new petition should be circulated. Sometime between September 11 and 13, 1978, Capasso again circulated a decertification petition. Relating to this, a meeting was held at Schwabben Hall in Bridgeport, a German social club where warehouseman Sal Angelico was a member, on or about September 13. At this session Capasso told the men that the decertification effort had the "blessing" of Block. This meeting was cut short when Union Official Edward Iulo showed up and began a heated argument with Capasso. Angelico offered his home for a meeting the next day for purposes of getting this second decertification petition signed. That next day, September 14, in the morning, the meeting at Angelico's home in fact took place. Capasso again argued the antiunion position and eventually 18 unit members of a total complement of 28–32 signed the second decertification petition. Two of such 18 employees who signed the decertification petition were Supervisors Capasso and Pavlowski. Employees Gramesty and Perri apparently signed said decertification petition on September 13, 1978. The other employees signed said petition on September 14, 1978. The typed language on said petition was as follows:

> We the undersigned employees of connecticut distributors, Inc., 160 Avon Street, Stratford, Connecticut, members of the International Brotherhood of Teamsters Local 1040 hereby state that we no longer wish to be represented by the International Brotherhood of Teamsters Local 1040.
>
> Date
> Name
> Address

On September 14, 1978, Capasso, Assistant Dispatcher Hank Pavlowski, Sal Angelico, and one other employee delivered the recently signed petition to Attorney Ferrante, who then called Company Attorney Smith to inform him of the existence of the petition. A messenger was then sent by Respondent to Ferrante's office to pick up the decertification petition. Respondent then filed that same afternoon an RM petition, using the employee petition as evidence of the objective considerations upon which it based its "good-faith doubt" of the Union's majority status.

[7] Both the General Counsel and Respondent have presented excellent briefs. Portions of such briefs may be deemed to be a tendering of proposed findings of fact. Where such proposed findings of fact coincide with my findings upon consideration of all of the evidence, I have accepted such findings of facts, at times with modifications, as my own.

[8] Considering the timing of all of the events, I fix the time of Capasso's talking to Block as indicated on September 8, 1978.

[9] Considering the totality of the evidence, I am persuaded that Capasso did not refer to additional benefits beyond what had been revealed on August 31, 1978.

On September 15, 1978, Respondent transmitted a letter to Iulo of the Union and sent carbon copies of such letter to the employees in the bargaining unit. Said letter indicated that Respondent had filed an election petition in Case 2-RM-1837 because it believed that Local 1040 no longer represented a majority of the employees for the purpose of collective bargaining.

Considering all of the foregoing, I am persuaded and conclude and find that Capasso acted as an agent for Respondent at all times while circulating the above-referred-to union decertification petitions. As indicated beforehand, Capasso was a supervisor of Respondent within the meaning of the Act. Despite the fact that Capasso was a union member and included in the bargaining unit, Capasso remained an arm of Respondent. On or about September 8, 1978, when Capasso asked Block for the name of a labor attorney and told Block that many of the men were dissatisfied with the Union, Respondent was aware that Capasso was in fact a supervisor of Respondent. Whether Capasso was a supervisor or not, Respondent had no right to interfere with its employees' actions concerning support of the Union. Since Capasso in fact was a supervisor who was included in the bargaining unit, Respondent had a higher obligation not to interfere with its employees' right to support the Union. Under the circumstances of the events of August 31 to September 14, 1978, and thereafter, Respondent's reliance upon Capasso's actions of circulating the union decertification petition in the filing of the representation petition in Case 2-RM-1837 did not constitute a disavowal of his conduct; said conduct constituted condonation of Capasso's acts of interference with the employees' Section 7 rights. Further, most revealing as to whether Capasso was acting as an agent of Respondent was Capasso's remarks that Capasso's decertification efforts had the blessing of Comptroller Block. Thus, Capasso, as an arm of Respondent, made statements in the nature of an admission by Respondent that he was acting as its agent. Considering this and the totality of the facts, it is clear that Respondent is responsible for Capasso's acts in circulating the "decertification" petitions between September 11 and 14, 1978.

C. *The Appropriate Bargaining Unit*

The General Counsel's pleadings alleged and Respondent's pleadings admitted that the following referred to employees of Respondent constituted a unit appropriate for the purposes of collective bargaining within the meaning of the Act:

> All full-time and regular part-time drivers, warehousemen, dispatchers, and assistant dispatchers, employed by Respondent at its Stratford, Connecticut, facility, excluding all other employees, confidential employees, guards, and all supervisors as defined in Section 2(11) of the Act.

At the hearing, the parties stipulated in effect that "drivers' helpers" should be included in the appropriate bargaining unit. There was some dialogue by counsel indicating that the "bargaining" contract in existence between Respondent and the Union for many years had "inclusions" but did not set forth "exclusions," and that, because of the passage of time, counsel was not sure as to the categories of employees excluded from the contract. Counsel for the General Counsel and Respondent revealed a willingness to agree that the appropriate unit included drivers, drivers' helpers, warehousemen, assistant warehouse dispatchers, and the warehouse dispatcher. Respondent's counsel stated that the question of who should be excluded had not been clearly defined in the past, that some "casuals" had been included in the unit in the past, and that some casuals had been excluded. Respondent's position was that casuals should be excluded from the bargaining unit.

Although the parties are in agreement that "dispatchers" were in the appropriate bargaining unit, there cannot be said to be a meeting of the minds on such point. Thus, the General Counsel contends that Capasso was a "supervisor," but that, however, this fact does not affect the unit question. Respondent contends that Capasso and the assistant dispatchers are not supervisors. The facts do not reveal that the dispatcher or assistant dispatcher positions are of the type that some individuals occupying such positions may be supervisors and that some may not be supervisors, or that the duties of each individual is determinative. Rather, the facts reveal that Respondent's dispatcher and assistant dispatcher positions are supervisory positions. Thus, such positions are not properly to be included in an appropriate bargaining unit sanctioned by the Board and utilized as a bargaining unit in remedial order provisions. However, the inclusion of such dispatcher and assistant dispatcher positions in a bargaining unit by the parties has not been found by the Board or the courts to be unlawful.

The question is whether the exclusion of the dispatcher and assistant dispatcher positions from the appropriate bargaining unit destroys the bargaining unit in existence. Since such dispatcher and assistant dispatcher positions are only 3 in number and the bargaining unit consists of at least 28-32 employees, the elimination of such 3 positions from the bargaining unit is insubstantial. Thus, the bargaining obligation, as set forth later, continues as to the hard core unit.

I note that Respondent's counsel contends that casuals should be excluded from the appropriate bargaining unit, but that, however, some casuals have been included and some casuals have been excluded from the unit. The collective-bargaining agreement in existence until August 31, 1978, revealed references to "regular" and "all" employees and to "employees," and to drivers, drivers' helpers, and warehousemen. Such contract and all of the facts reveal that the contract covers the terms and conditions of regular and part-time employees, permanent employees, and temporary or casual employees.

The term "casual" is often used loosely. Employees who are not deemed regular or part-time permanent employees may be casual or in fact may be called casual when their employment is of a repetitive nature or they have such a reasonable expectancy of future employment that they should be deemed to be employees in the unit. A precise finding as to whether casual employees are in or out of the unit would not appear to affect the results

found in this case. However, in the exclusions it will be noted that employees who are casual and who do not have a work history to reveal a reasonable expectation of future reasonably regular employment, or who do not have such reasonable expectation otherwise, are excluded from the bargaining unit.

Considering all of the foregoing, I conclude and find that the appropriate bargaining unit in existence at all times material to this proceeding was and is: All drivers, drivers' helpers, and warehousemen employed by Respondent at its Stratford, Connecticut, facility, excluding all other employees, confidential employees, guards, and all supervisors as defined in Section 2(11) of the Act, and including in said exclusions such casual employees who do not have a reasonable expectancy of future employment on a reasonably regular basis.

D. *The Majority Status*

The facts are clear that at all times material to this proceeding until around September 14, 1978, and commencing again around November 21, 1978, until around November 30, 1978, Respondent recognized the Union as the exclusive collective-bargaining representative of a unit of employees including drivers, drivers' helpers, warehousemen, the dispatcher, and assistant dispatchers, all employed at Respondent's Stratford facility. The facts reveal that such unit included the positions of dispatcher and assistant dispatcher, that such positions are supervisory positions, and that the exclusion of such positions from the bargaining unit is insubstantial and does not affect the question of majority status in the remainder unit which has been found to constitute an appropriate bargaining unit.

Considering the foregoing and the presumption of majority and exclusive collective-bargaining representative status flowing from the recognition of the Union, the collective-bargaining agreement, including union-security provisions and the collective-bargaining relationship, the overall facts herein revealing unfair labor practices in connection with the circulation of the union decertification petition by Capasso, the lack of evidence to disabuse the continuing effect of such unfair labor practices, and the unfair labor practices of Respondent in refusing to bargain with the Union as detailed later herein, it is clear and I conclude and find that the Union was the designated representative of a majority of the employees in the appropriate collective-bargaining unit, set forth beforehand, and was and is the exclusive collective-bargaining representative of the employees in said unit.

E. *Anthony Capasso—Circulation of the Union Decertification Petition and Promises of Benefits*

The General Counsel alleges in effect and Respondent denies that (1) on or about three occasions during the week of September 11, 1978, the exact dates being presently unknown, Respondent, acting through Anthony Capasso, at various locations in Bridgeport, Connecticut, condoned, approved, sponsored, and encouraged the circulation among its unit employees of a petition calling for the decertification of the Union, and (2) on the occasions referred to above Capasso made promises of benefits in violation of Section 8(a)(5) and (1) of the Act.

The issue of Respondent's responsibility for Capasso's conduct has been disposed of previously. Thus, it has been found that Capasso was acting as an agent for Respondent when he circulated union decertification petitions during the week of September 11, 1978. The evidence is clear that Capasso on or about September 8, 1978, contacted Comptroller Block by telephone and requested the name of a labor attorney,[10] that he later received several names of attorneys, that he contacted an attorney, that he circulated several union decertification petitions for employees to sign, and that he told employees that they would receive certain benefits (the same as Respondent's last offer as of August 31, 1978, which were increased benefits as regards wages and some other benefits as compared to the existing benefits on August 31, 1978) if they signed the petition getting rid of the Union. Later a petition signed by many of the employees was furnished to the attorney contacted by Capasso, said petition was thereafter transmitted to Respondent by said attorney, and Respondent filed a petition in Case 2-RM-1837, seeking an election to determine the Union's representative status in a unit roughly equivalent to the appropriate collective-bargaining unit found herein.

The General Counsel contends and Respondent denies that Respondent has violated Section 8(a)(5) and (1) of the Act by the conduct of making promises of benefits and circulating the union decertification petition as referred to above.

The overriding question is the one of Respondent's responsibility for Capasso's conduct. It has been found that Respondent is responsible for Capasso's conduct in circulating such petition. Such being so, it is clear that Respondent, by virtue of Capasso's involvement in the circulation of a petition designed to get rid of an incumbent union, has violated Section 8(a)(5) and (1) of the Act. It is clear that such conduct by Capasso interfered with the employees' exercise of their right to be for or against the Union. It is also clear that where there is an incumbent union and an obligation to bargain with said union that the act of attempting to secure employees to sign a petition to decertify the union is so contradictory of the obligation to bargain that it, in and of itself, constitutes a refusal to bargain.

As to the question of "promises of benefits," it is clear that Capasso told employees that if they rejected the Union, they would receive the benefits offered by Respondent. No mention was made that Respondent had put or was putting these benefits into being regardless of whether the employees signed the decertification petition. Thus, it is clear that Capasso presented the idea of such benefits as benefits to be enjoyed conditioned upon their rejection of the Union.[11]

[10] I credit Block's testimony that such conversation occurred over the telephone. I discredit Capasso's testimony where it is inconsistent with the facts found.

[11] The overall record makes it clear that Respondent litigated the question of "promises of benefits." Any contention at this time of an "impasse" defense appears to be a rationalization of a desire to have presented more evidence during the hearing.

Considering the foregoing, I am persuaded and conclude and find that Respondent violated Section 8(a)(5) and (1) of the Act by Capasso's conduct in making promises of benefits while circulating the petition to decertify the Union and by Capasso's circulation of said decertification petition.[12]

F. *Withdrawal of Recognition*

The General Counsel alleges and Respondent denies that "Respondent, following the filing of its petition in Case No. 2-RM-1837, withdrew its recognition of the Union as the exclusive representative of its employees in the unit described above in paragraph 6 and failed and refused to continue bargaining for a new contract as set forth above in subparagraph 7(c)."[13]

Again the facts are clear that Respondent filed, in Case 2-RM-1837, a petition seeking an election to determine the representative status of the Union on September 14, 1978, in a unit roughly equivalent to the appropriate bargaining unit found in this case. Following such filing of such RM petition, Respondent by President Harrison transmitted the following letter to Iulo of the Union and sent carbon copies of such letter to the employees in the appropriate bargaining unit:

> Dear Mr. Iulo:
>
> This is to inform you that Connecticut Distributors Inc. has filed an Election Petition with the National Labor Relations Board in New York because it believes that Local 1040 no longer represents a majority of its employees for the purpose of collective bargaining. The case has been docketed as 2-RM-1837.
>
> Very truly yours
> Donald W. Harrison
> President

From September 14, 1978, to on or about November 13, 1978, Respondent took no steps to further collective bargaining with the Union.

On October 5, 1978, Union Representative Iulo attended a seminar conducted by Respondent's Attorney Smith and his associate, Summa, at Fairfield University (the seminar was unrelated to the situation involving Respondent). In the parking lot after the seminar Iulo and Smith had a conversation. Iulo asked Smith when bargaining could resume, and Smith replied that he would not bargain while the RM petition filed by Respondent was pending.[14]

By November 13, 1978, Respondent was advised by Region 2 that the petition in Case 2-RM-1837 would be dismissed because Capasso was a supervisor and had been involved in the circulation of such petition. On or about November 13, 1978, Respondent took steps to have negotiations resume between it and the Union. Apparently, around this time Respondent took steps to have its petition in Case 2-RM-1837 withdrawn. In any event, the pleadings establish that such petition was withdrawn on or about November 17, 1978. Thereafter, on November 21, 1978, a bargaining session between Respondent and the Union occurred. At such time, another session was scheduled for November 30, 1978.

Prior to the renewed bargaining session on November 21, 1978, it should be noted that the Union filed on October 2, 1978, an unfair labor practice charge docketed as Case 2-CA-15908. Said unfair labor practice charge averred that Respondent had violated Section 8(a)(1) and (3) of the Act, and averred language alleging that Respondent had failed to bargain in good faith with the Union. The language therein also averred that Respondent's supervisors had circulated decertification petitions. Later, on October 16, 1978, the Union amended the charge in Case 2-CA-15908 to allege conduct violative of Section 8(a)(1), (3), and (5). The language averments remained in effect the same as before. By November 13, 1978, Respondent had been advised that the Region considered that there was merit to Case 2-CA-15908.

In the meantime, between November 14 and 17, 1978, rank-and-file employees Angelico and others circulated another union decertification petition. Such petition was signed by 56 employees; 27 of such employees were permanent replacements, 2 of such employees were Angelico and assistant dispatcher Pavlowski, 2 or 3 were employees hired as additional employees to the unit, and the rest of the signing employees were casual employees.

Said union decertification petition commenced as follows:

> Mr. Harrison:
>
> We understand you might bring the Union back! We the undersigned want you to know we want nothing to do with the Teamsters Union.

Following the foregoing, the employees placed their signatures, addresses, and dates of signing.

On the day after the November 21, 1978, bargaining session Stanley Block noticed on President Harrison's desk the decertification petition Angelico had circulated. Thereafter, Respondent caused the scheduled November 30, 1978, bargaining session to be canceled.

On November 30, 1978, Respondent sent the following letter to the Union:

> Dear Mr. Iulo:
>
> This is to inform you that Connecticut Distributors, Inc. has filed an Election Petition with the National Labor Relations Board in New York because it be-

[12] The question of the deviation between the appropriate bargaining unit found in this proceeding and the existing bargaining unit has been considered. The difference is insubstantial, and Respondent's bargaining obligation is fixed because of the bargaining obligation as regards the hard core appropriate unit.

[13] The references to par. 6 and subpar. 7(c) above are to paragraphs in the complaint. Again consideration has been given to the deviation between the existing bargaining unit, the alleged unit, and the bargaining unit found appropriate. Such deviation is too insubstantial to affect the question of a bargaining obligation as found herein.

[14] The facts are based upon the credited testimony of Iulo. Although Summa's testimony appears to conflict with Iulo's, Summa's testimony was largely summary and stated in the nature that what was said was "to the effect of." Considering all of the facts, I am persuaded that Iulo was a reliable and truthful witness. I credit his testimony over Summa's where there is conflict.

lieves that Local 1040 no longer represents a majority of its employees for the purpose of collective bargaining.

Until this matter is resolved, Connecticut Distributors, Inc. declines to bargain further.

Very truly yours,

SIEGEL, O'CONNOR & KAINEN, P.C.

Thomas Royall Smith

Thereafter, as previously indicated, the petition referred to in the November 30, 1978, letter was filed on December 4, 1978. Such petition was docketed as Case 2-RM-1847. The decertification petition circulated by Angelico served as Respondent's alleged objective considerations in support of its good-faith doubt of the Union's majority status. No bargaining has taken place since November 21, 1978.

The General Counsel contends in effect that Respondent, on or about September 14, 1978, withdrew recognition of the Union as the exclusive representative of the employees in the appropriate bargaining unit. Respondent contends in effect that it did not withdraw recognition of the Union, that it merely filed the representation petition and notified the Union and the parties of its actions, and that the Union did not request it to bargain between September 14 and November 14, 1978, when Respondent undertook steps to resume bargaining.

Considering all of the facts, I am persuaded and conclude and find that Respondent withdrew recognition from the Union on or about September 14, 1978. The reliance by Respondent upon the petition to decertify the Union circulated by its agent Capasso in the filing of the RM petition on September 14, 1978, certainly reveals conduct violative of Section 8(a)(5) and (1) of the Act, the filing of a representation petition under such circumstances with a letter relating thereto to the Union and to the employees is so inconsistent with the obligation to bargain that it is hard to believe that such acts do not reveal a withdrawal of recognition.[15] Respondent's own actions in taking steps to "resume" bargaining when it was taking steps to withdraw its representation petition certainly reveal that Respondent construed that it did not have to and was not going to bargain during the pendency of its representation petition. Hardly needed is the evidence of the statements by Attorney Smith that bargaining would not occur while the representation petition was pending. Such evidence reveals, however, that Respondent had on or about September 14, 1978, withdrawn recognition from the Union.

Although the overall facts may make it suspicious that Respondent's resumption of bargaining on November 21, 1978, was merely for show, it is not necessary to so find herein. It is clear and I conclude and find that Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union on September 14, 1978, and that such continued withholding of recognition until on or about November 13, 1978, constituted conduct violative of Section 8(a)(5) and (1) of the Act.

Considering the pleadings and statements made at the hearing and on brief by the General Counsel, it appears that the General Counsel contends that Respondent's cancellation of the November 30, 1978, bargaining session, its withdrawal of recognition of the Union at such time, and the continued refusal to bargain is violative of the Act; that Respondent cannot rely upon the union decertification petition circulated by Angelico in November, 1978, because of the events of Capasso's union decertification petition in September 1978; and that in effect Respondent's and the Union's negotiations on November 21, 1978, resulted from a "settlement" and therefore Respondent was not free to question the Union's majority status.

Respondent contends that the petition circulated by Angelico constituted objective evidence upon which to base a good-faith doubt of the Union's majority status, and that the resumed bargaining on November 21, 1978, did not flow from a "settlement" agreement with the Union.

Considering all of the facts, I am persuaded that Respondent did not have a good-faith doubt as to the Union's majority status, and that Angelico's petition, under the circumstances, did not constitute evidence of objective criteria upon which to base such doubt.

Thus, as to the particular question of majority status or a basis for doubt thereto as related to the Angelico union decertification petition of November 13-17, 1978, I am persuaded that such petition does not constitute evidence upon which to base an objective good-faith doubt of majority status. First, only a short time before, Respondent by Capasso had interfered with the employees' support of the Union by the circulation of a union decertification petition. As of the time of Angelico's circulation of a petition, Respondent had taken no steps to dislodge the illegal effect of the prior petition from the employees' minds. Respondent was well aware of Capasso's acts, his union decertification petition, and that steps had not been taken to disabuse the employees' minds of the illegal effects of such petition. Thus, Respondent had no basis for a good-faith doubt of the Union's exclusive collective-bargaining status as a result of the Angelico union decertification petition because of the continuing taint flowing from Capasso's earlier union decertification petition.

The General Counsel appears to have attempted to establish that the scheduled November 30, 1978, bargaining flowed from a settlement agreement. The facts do not support such contention. Respondent withdrew its RM petition on November 17, 1978, and bargaining resumed on November 21, 1978. At most it appears that the Union withdrew its 8(a)(1) and (5) charges because it believed that it would help the atmosphere of bargaining. It is clear that there was no specific agreement between Respondent and the Union that bargaining would ensue conditioned upon the withdrawal of the charges.

The foregoing finding, however, does not eliminate the need for Respondent to have given the bargaining relationship on November 21, 1978, a reasonable time for fruition.

[15] The bargaining obligation is one held by both Respondent and the Union. Wherein Respondent has taken steps to indicate to the Union and the employees that it "doubts" the Union's majority status, the burden is on the Respondent, if it desires to bargain, to indicate such to the Union.

It is true that there is a principle of law usually related to bargaining following an agreement to bargain as settlement of a dispute relating to bargaining, and that such principle is to the effect that such bargaining relationship must be given a reasonable time for fruition. Such principle, however, is not limited to settlement situations. It is applicable to other situations wherein a bargaining relationship has been established. Here Respondent had earlier disestablished, lawful or not, a bargaining relationship. Here, for whatever reason by Respondent, such bargaining relationship had been reestablished. Fundamentally, it is clear that such reestablished bargaining relationship must be accorded a reasonable time for fruition. Accordingly, since a reasonable time for bargaining had not elapsed after November 21, 1978, Respondent was not free after November 21, 1978, and by November 30, 1978, to withdraw recognition from the Union.

In sum, I am persuaded and conclude and find that Respondent has violated Section 8(a)(5) and (1) of the Act by the withdrawal of recognition from the Union on November 30, 1978, and by its continued refusal to meet and bargain with the Union.

G. *The Unfair Labor Practice Strike*

The facts are undisputed that the employees in the appropriate bargaining unit commenced a strike on September 1, 1978, and that such strike continued in effect until around June 18 or 19, 1979.

The General Counsel contends that such strike was converted into an unfair labor practice strike by Respondent's unfair labor practices. Respondent contends that the unfair labor practices, if such occurred, did not convert the strike in to an unfair labor practice strike. Respondent presented evidence to the effect that around December 14, 1978, Iulo for the Union communicated to another union official that the reasons for the strike were wages, pensions, insurance, and seniority.

Considering the facts, I find it clear that Respondent's unfair labor practices violative of Section 8(a)(5) and (1) of the Act and involving withdrawal of recognition from the Union and refusing to meet with and bargain with the Union had the obvious effect of prolonging a strike initiated for economic reasons and designed to obtain a bargaining agreement as regards wages, pensions, insurance, and seniority. Thus, it is clear that the strike of Respondent's employees was converted into an unfair labor practice strike on or about September 14, 1978, when Respondent initially withdrew its recognition of the Union.

H. *The Discriminatory Refusal To Reinstate Unfair Labor Practice Strikers*

On December 28, 1978, by personal visit to Respondent's facility, Charles Laufer, one of Respondent's employees who had engaged in the strike described above, made an unconditional offer to return to his former or substantially equivalent position of employment.

On or about the dates set forth opposite their respective names, by letter to Respondent, the following employees who had engaged in the strike described above, made unconditional offers to return to their former or substantially equivalent positions of employment:

John Hall	June 19, 1979
Timothy Bouro	June 18, 1979
Van Michaels	June 18, 1979
Leo Nicholas	June 19, 1979
Gus Trotto	June 19, 1979
Dennis Novak	June 18, 1979
Aaron Bernstein	June 18, 1979
Kevin O'Day	June 29, 1979
Charles Laufer	June 19, 1979

On December 28, 1978, Respondent failed and refused to reinstate or offer to reinstate Charles Laufer to his former or a substantially equivalent position of employment, and since said date has continued to fail and refuse to reinstate or offer to reinstate said employee to his former or substantially equivalent position of employment.

On or about the dates set forth opposite their respective names, above, Respondent failed and refused to reinstate or offer to reinstate the named employees to their former or substantially equivalent positions of employment, and since said dates has continued to fail and refuse to reinstate or offer to reinstate said employees to their former or substantially equivalent positions of employment.

The facts are clear that all of the foregoing employees were unfair labor practice strikers and, as such, were entitled to be reinstated to their former jobs upon their unconditional offers to return to work.

The law is clear that a respondent, subject to the Act and the Board's jurisdiction, violates Section 8(a)(3) and (1) of the Act when it refuses and fails to reinstate unfair labor practice strikers to their former jobs when such strikers have made unconditional offers to return to work. Thus, it is clear that Respondent has violated Section 8(a)(3) and (1) of the Act by its failure to reinstate the employees, referred to above, on or about the time of their unconditional offer to return to work.[16]

Anthony Perri, Richard Shepard, and Donald Whittle, on or about June 18 or 19, 1979, made individual unconditional offers to return to their former or substantially equivalent positions of employment. Since on or about the same dates indicated, Respondent has failed and refused to reinstate such employees to their former or substantially equivalent positions of employment.

As to Whittle, who made his unconditional offer to return to work on June 18, 1979, Respondent takes the position that Whittle engaged in misconduct in connection with the strike which disqualifies Whittle from being entitled to reinstatement or to a remedial order. The General Counsel takes a position in effect that the misconduct by Whittle was not so serious as to deny him the right of reinstatement.

[16] The facts are clear that Charles Laufer was returned to work on September 17, 1979. Further, it appears that Charles Laufer made an unconditional offer to return to work on more than one occasion.

The facts relating to whether Whittle engaged in misconduct which adversely affected his right of reinstatement are as follows.[17]

Several days prior to December 11, 1978, Haramis had driven his car through the picket line at the entrance to Respondent's premises. On such occasion, Whittle threw a rock which hit the windshield of employee Haramis' car. Such rock damaged the windshield in that it caused a hole necessitating replacement of the windshield.

On December 11, 1978, Whittle entered Respondent's warehouse around 6 p.m. Shortly thereafter, Whittle and Haramis became engaged in a conversation during which time Haramis told Whittle that he (Whittle) owed Haramis money because he threw a rock which broke the windshield of Haramis' car as he attempted to drive through the picket line. When Whittle would not answer him, Haramis said, "If you don't have anything to say now, then you must be a pussy, if you can't say anything else about it." The conversation abruptly ended when Whittle deliberately turned his back on Haramis, put his gloves on, and turned back around and struck Haramis in the face. In doing so, Whittle knocked Haramis to the ground.

Considering the foregoing, I find it clear that during the strike Whittle engaged in serious misconduct, that as a result of such misconduct Respondent had no obligation to reinstate him upon his unconditional offer to return to work, and that Whittle, even though an unfair labor practice striker, is not entitled to be included in a remedial reinstatement order.

First, Whittle's conduct in throwing a rock at and hitting Haramis' windshield several days before December 11, 1978, constitutes serious misconduct disqualifying him from the right of reinstatement normally accorded unfair labor practice strikers upon their unconditional offer to return to work.[18]

Second, Whittle's conduct in hitting Haramis on December 11, 1978, under all of the circumstances, also constitutes serious misconduct disqualifying him from the right of reinstatement normally accorded unfair labor practice strikers upon their unconditional offer to return to work. In this regard, I have considered the fact that Haramis' remarks very well were intended to be provocative and were provocative. Such provocative remarks, however, obviously resulted from the effect of Whittle's earlier misconduct, his throwing a rock at and damaging the windshield of Haramis' car. Thus, Whittle's actions on December 11, 1978, thus, were not isolated or arising out of spontaneous events. Further, Whittle's action in putting on gloves before hitting Haramis negates any idea of mere animal exhuberance. Rather, Whittle's actions were of a premeditated nature, even if such premeditation was only for a few minutes.

Considering the above, the facts reveal that Whittle's conduct on December 11, 1978, as to the hitting of Haramis, and as to the rock throwing event several days earlier, was of such a nature as to eliminate Respondent's potential obligation to reinstate him because of his status as an unfair labor practice striker. Such conduct also eliminates the use of the remedial power of the Board concerning the reinstatement of Whittle as a result of his unfair labor practice striker status.[19]

As to Richard Shepard, Respondent contends that Shepard was a casual employee, that he did not participate in the strike, that Shepard was not an unfair labor practice striker, and that Shepard was not entitled to reinstatement upon his unconditional offer to return to work because he was not an unfair labor practice striker.

Shepard was a full-time employee toll collector for the State of Connecticut, Toll Division. As of the time of the strike at Respondent on September 1, 1978, Shepard had worked as a casual employee on a part-time basis at least for several years.[20] Shepard worked for Respondent for 11 days in August 1978. Respondent's records reveal, as an example, that Shepard had worked for Respondent during every month from January 1977 through August 1978. Considering such record and the evidence that Respondent expanded its work force during the time of the 1978–79 strike and that such expansion included the use of casual employees, the facts preponderate for a finding that Respondent would have had work for Shepard during the time of said strike.

Respondent's procedure for employing Shepard was to call Shepard, when needed, to come to work. The facts reveal that Shepard was a member of the Union, and that Respondent was aware of his membership in the Union because it deducted dues from his pay for transmission to the Union.

Respondent did not call Shepard to work during the strike.

Shepard credibly testified to the effect that he supported the strike, that he would not have crossed the picket line if called to work, and that he did not call Respondent seeking to go to work. Considering all of the foregoing, I find it clear that Shepard was in fact a striker and that both he and Respondent construed him to be a striker.[21] Thus, since the strike itself was converted to an unfair labor practice strike as of September 14, 1978, it is clear that when Shepard made his unconditional offer to return to work on June 19, 1979, Respondent was obligated to reinstate him to his former job. It is clear that Respondent failed and refused to timely reinstate Shepard to his former job. By such conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

As to Anthony Perri, Respondent contends that Perri was a casual employee, that he did not participate in the strike, that Perri was not an unfair labor practice striker, and that Perri was not entitled to reinstatement upon his unconditional offer to return to work because he was not an unfair labor practice striker.

[17] Such facts are based upon a composite of the credited aspects of the testimony of Haramis, Whittle, and Alacon. The testimony of any witness, by stipulation or otherwise, contrary to the facts found herein is discredited based upon a consideration of witness.

[18] *Bryan Infants Wear Company*, 235 NLRB 1305 (1978).

[19] *Bryan Infants Wear Company, supra.*

[20] Shepard worked for Respondent mostly as a driver. Whether one should describe Shepard as a casual employee is questionable. However, for the purposes of this case, it is not necessary to make a precise determination with respect thereto.

[21] Being a casual or a part-time employee does not eliminate such employees from an employer-employee relationship and a casual or part-time employee who engages in a strike has the rights of economic or unfair labor practice strikers as the case may be.

Perri had been a full-time employee of the Bridgeport Fire Department for about 20 years. Since 1964 or 1965, Perri had worked for Respondent on his days off. His work record for Respondent reveals, at least for 1977 and 1978, that he worked reasonably regularly for Respondent in the warehouse. Perri received his employment at Respondent simply by reporting to work.

Perri was on vacation when the strike commenced on September 1, 1978. Between that date and June 19, 1979, Perri made no effort to work at Respondent.

Perri credibly testified to his position and actions relating to the time the strike commenced and until the time of his unconditional offer to return to work on June 19, 1979, as is revealed by the following credited excerpts from his testimony:

> Q. I direct your attention to September 1, 1978; were you aware of a strike at Connecticut Distributors beginning at that time?
>
> A. Yes. I was on vacation though.
>
> Q. But you were aware that a strike did begin?
>
> * * * * * *
>
> A. Yes.
>
> Q. Yes. As a member of the IAFF what was your position on the strike at Connecticut Distributors?
>
> A. IAFF means my fire department union?
>
> Q. Right.
>
> * * * * *
>
> A. I had no position.
>
> Q. You didn't support the strike?
>
> A. I didn't feel in my own heart that I should because that was my part time job and I didn't want to get involved with any person's full time job.
>
> * * * * *
>
> Q. Now, Mr. Perri, did you work at all during the strike?
>
> A. No.
>
> Q. Why not?
>
> A. The same answer goes for him, what I just said to him, because I didn't feel I should break the picket line and, you know, take someone else's job when they weren't working, number 1, and number 2, I didn't want anything to happen to my full time job.
>
> Q. And you didn't come to work even when you had a day off during the strike; is that right?
>
> A. No.
>
> Q. That is just for your part time work? Just the same way you were beforehand?
>
> A. Yes, I would not go to work during the strike.
>
> Q. Was that your position, that you weren't going to go to work during the strike?
>
> A. That was my decision.

Considering all of the foregoing, I am persuaded that the facts reveal that Perri was an unfair labor practice striker and that Respondent was obligated to reinstate him to his former job when he made his unconditional offer to return to work on June 19, 1979.

Thus, the facts clearly reveal that Respondent was aware that Perri had, as a matter of practice, simply reported to work on his days off as a firefighter. Perri's failure to so report to work was of such a nature that Respondent reasonably was aware that Perri was striking and withholding his services during the time of the strike.[22]

Perri's testimony reveals, in my opinion, that Perri did not want to take sides between Respondent and the Union as to the strike that commenced on September 1, 1978. It is clear that he viewed crossing the picket line as taking sides, and that he considered himself not involved in the strike by not reporting to work. Practically, it is clear that his refusal to cross the picket line supported the striking employees. This, however, does not mean that he viewed himself as supporting the Union or taking sides by refusing to cross the picket line. Whether he supported the strike or the Union, however, is not the question. The facts clearly reveal that he was in fact striking. An employee has a Section 7 right to engage in or to refrain from engaging in protected concerted activity. Thus, Perri's strike activity, viewed by him as refraining from supporting the Union, was protected in and of itself. Respondent's unfair labor practices, which prolonged the strike activities of the Union and its supporting members, similarly prolonged and converted Perri's strike activities to that of an unfair labor practice striker. This being so, Perri did in fact become an unfair labor practice striker and was entitled to be reinstated to his former job when, on June 19, 1979, he made an unconditional offer to return to work. Respondent's failure to timely reinstate Perri to his former job constituted conduct violative of Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent refused to reinstate unfair labor practice strikers[23] upon their unconditional

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[22] Respondent offered no testimony relating to its refusal to reinstate Perri when he made his unconditional offer to return to work on June 19, 1979.

[23] Such unfair labor practice strikers whom Respondent refused to reinstate were John Hall, Anthony Perri, Timothy Bouro, Van Michaels, Leo Nicholas, Richard Shepard, Gus Trotto, Dennis Novak, Aaron Bernstein, Kevin O'Day, and Charles Laufer.

offers to return to work, in violation of Section 8(a)(3) and (1) of the Act, the recommended Order will provide that Respondent offer each reinstatement to his former job,[24] and make each whole for any loss of earnings or other benefits within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), except as specifically modified by the wording of such recommended Order.[25]

Having found that Respondent has withdrawn recognition from and refused to bargain with the Union as regards the wages, hours, terms and conditions of employment of the employees in the appropriate bargaining unit in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent be ordered to recognize said Union and, upon request, to bargain collectively with said Union as regards the wages, hours, and terms and conditions of employment of the employees in the appropriate bargaining unit as found herein.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Connecticut Distributors, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brewery and Soft Drink Workers, Liquor Drivers and New and Used Car Workers, Local 1040, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. All drivers, drivers' helpers, and warehousemen employed by Respondent at its Stratford, Connecticut, facility, excluding all other employees, confidential employees, guards, and all supervisors as defined in Section 2(11) of the Act, and including in said exclusions such casual employees as do not have a reasonable expectancy of future employment on a reasonably regular basis, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

4. By circulating union decertification petitions, by withdrawing recognition of and refusing to bargain with the Union, and by acts related thereto, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

5. By refusing to reinstate unfair labor practice strikers, upon their unconditional application for reinstatement to their former jobs, Respondent has discouraged membership in a labor organization by discriminating in regard to tenure of employment, thereby engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

6. By the foregoing and by interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

The Respondent, Connecticut Distributors, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment, because of their union or protected concerted activities.

(b) Circulating union decertification petitions or withdrawing recognition from and refusing to bargain with the Union concerning wages, hours, and terms and conditions of employment of employees in the appropriate bargaining unit set out hereinafter.

(c) Promising employees benefits to persuade them to reject the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer John Hall, Anthony Perri, Timothy Bouro, Van Michaels, Leo Nicholas, Richard Shepard, Gus Trotto, Dennis Novak, Aaron Bernstein, Kevin O'Day, and Charles Laufer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make John Hall, Anthony Perri, Timothy Bouro, Van Michaels, Leo Nicholas, Richard Shepard, Gus Trotto, Dennis Novak, Aaron Bernstein, Kevin O'Day, and Charles Laufer whole for any loss of earnings or other benefits they may have suffered by reason of the unlawful discrimination

[24] Although the facts reveal that Charles Laufer returned to work on September 17, 1979, and that Shepard was called relating to work in December 1979, the facts are insufficient to reveal that such steps by Respondent fully complied with the obligations of reinstatement required by the Act and by this Decision. Such steps as undertaken can be considered in the compliance stage of this proceeding.

[25] Since it is clear that Respondent did not reinstate such employees upon their unconditional offers to return to work, the remedial order requires backpay back to the dates of the offers to return to work. *Harris-Teeter Super Markets, Inc.*, 242 NLRB 132 (1979).

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

against them by paying each a sum of money as set forth in the Remedy section of this Decision.

(b) Recognize and, upon request, bargain collectively in good faith with Brewery and Soft Drink Workers, Liquor Drivers and New and Used Car Workers, Local 1040, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, over wages, hours, and terms and conditions of employment of the employees in the appropriate collective-bargaining unit set forth below. The appropriate collective-bargaining unit is:

> All drivers, drivers' helpers, and warehousemen employed by Respondent at its Stratford, Connecticut, facility, excluding all other employees, confidential employees, guards, and all supervisors as defined in Section 2(11) of the Act, and including in said exclusions such casual employees as do not have a reasonable expectancy of future employment on a reasonably regular basis.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at Respondent's facility in Stratford, Connecticut, copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of unlawful conduct not specifically found to be violative herein be dismissed.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to reinstate unfair labor practice strikers upon their unconditional offer to return to work or otherwise discriminate against employees in regard to hire or tenure of employment, or any term or condition of employment, because of their union or protected concerted activities.

WE WILL NOT circulate union decertification petitions or withdraw recognition from and refuse to bargain with the Union, named below, concerning wages, hours, and terms and conditions of employment in the appropriate bargaining unit set forth below.

WE WILL NOT promise employees benefits to persuade them to reject the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended, except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

WE WILL offer John Hall, Anthony Perri, Timothy Bouro, Van Michaels, Leo Nicholas, Richard Shepard, Gus Trotto, Dennis Novak, Aaron Bernstein, Kevin O'Day, and Charles Laufer immediate and full reinstatement to their respective former jobs or, if such positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make John Hall, Anthony Perri, Timothy Bouro, Van Michaels, Leo Nicholas, Richard Shepard, Gus Trotto, Dennis Novak, Aaron Bernstein, Kevin O'Day, and Charles Laufer whole for any loss of earnings or other benefits they may have suffered by reason of the unlawful discrimination against them, with interest.

WE WILL recognize and, upon request, bargain collectively in good faith with Brewery and Soft Drink Workers, Liquor Drivers and New and Used Car Workers, Local 1040, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, over wages, hours, and terms and conditions of employment of the employees in the appropriate collective-bargaining unit set forth below. The appropriate collective-bargaining unit is:

> All drivers, drivers' helpers, and warehousemen employed by the Employer at its Stratford, Connecticut, facility, excluding all other employees, confidential employees, guards, and all supervisors as defined in Section 2(11) of the Act, and including in said exclusions such casual employees as do not have a reasonable expectancy of future employment on a reasonably regular basis.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

CONNECTICUT DISTRIBUTORS, INC.